(11)

No. 84-16

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

KENNETH CORY, LEO T. MCCARTHY, AND JESSE R. HUFF,
members of the California State Lands Commission,
Appellants,

VS.

WESTERN OIL & GAS ASSOCIATION, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF APPELLANTS

JOHN K. VAN DE KAMP
Attorney General of the
State of California
N. GREGORY TAYLOR
Assistant Attorney General
DENNIS M. EAGAN
Deputy Attorney General
(Counsel of Record)
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3650
Counsel for Appellants

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

21

PARTIES BELOW

Appellees state in their brief (p. i) that Edgington Oil Company is an additional appellee in this case. Edgington Oil Company was a named plaintiff in the lawsuit when it was initially filed in the district court (J.A. 6), but was later dismissed by stipulation of the parties (J.A. 1, Dkt. No. 21).

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

TABLE OF AUTHORITIES CITED

No. 84-16

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

KENNETH CORY, LEO T. MCCARTHY, AND JESSE R. HUFF,
members of the California State Lands Commission,
Appellants,

vs.

WESTERN OIL & GAS ASSOCIATION, et al.,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF APPELLANTS

I. THE CHALLENGED FORM OF GROUND RENT IS NOT A CHARGE FOR THE MERE ENTRY OF GOODS INTO THE STATE

Without question, "a simple charge for the privilege of bringing merchandise into the country" would be prohibited under the Import-Export Clause. (See Appellees' Br., p. 18, citing *Michelin Tire Corp. v. Wages* (1976) 423 U.S. 276.) But the type of charge authorized by the challenged regulation is not premised on the entry of goods into the political jurisdiction of the State. Even where a tax varying with the quantity and value of the taxed goods is involved, such a tax may nonetheless be levied against imports if it is premised on the provision of governmental services enjoyed alike by importers and other citizens. *(Michelin, supra,* 423

U.S. at pp. 287, 288-289.) Rent charged for the exclusive private use of a specific parcel of public property is even more clearly outside the narrow scope of the constitutional proscription against imposts or duties on imports. The existence of this independent quid pro quo forecloses any assertion that the charge is being made for mere entry of the goods into the jurisdiction.

Early in their brief, appellees concede that "a person who has the exclusive use of a piece of the State's property should pay a fair rental for it. . . ." (p. 6.) It is therefore surprising to read later statements asserting that the State Lands Commission (Commission) is attempting to collect "a 'throughput rental' placed on every barrel of petroleum brought into the state" (p. 12) and likening the challenged rental mode to "a simple charge by a state for the privilege of bringing merchandise in or out of a State" (p. 17).

Not only is the charge tied to the leasing of specific parcels of state property, but the vast majority of goods entering California escape this alleged "tariff". No volumetric rent accrues, for instance, when a vessel enters and traverses state waters and offloads at any of various port facilities administered by local public entities or private parties. Los Angeles and Long Beach Harbors *alone* handle approximately 70 percent of the tonnage moving through California ports.[1] Neither the goods moving through these ports, nor the considerable additional tonnage moving through ports such as San Diego, San Francisco, Oakland, Sacramento, and Stockton generate any revenue to the State. It is a strange "tariff" that has such limited application.

---

[1] See U.S. Army Corps of Engineers, Waterborne Commerce of the United States, Calendar Year 1982, Part 5, National Summaries, p. 18. A total of 108,158,139 short tons of cargo was moved through California ports in 1982. Long Beach handled 42,010,254 tons and Los Angeles 33,099,929 tons. (*Ibid.*)

To reiterate, the only occasion for charging of a volumetric rent by the State is where the loading or offloading occurs at port facilities that are on state-owned lands committed by lease to the exclusive use of one of the State's lessees. We are thus not dealing with rights of transient passage through state waters that overlie state-owned lands, rights that all members of the public share in common, free of charge. Rather, we are dealing with the exclusive appropriation of described parcels of the State's land for private gain. Similarly, no charge is made for random anchorage sites, to which any other vessel is equally entitled.

For these reasons, the oil companies' reliance upon *Cannon v. New Orleans* (1874) 87 U.S. (20 Wall.) 577, and *Harman v. Chicago* (1893) 147 U.S. 396, and upon certain dicta in *Packet Co. v. Keokuk* (1877) 95 U.S. 80, is misplaced.[2] Neither *Cannon* nor *Harman* nor the cited

---

[2] *Cannon* was a Tonnage Clause case and is distinguished in our opening brief at page 34, footnote 24. The charge by New Orleans was imposed for the mere privilege of entering the port; no special land or services were provided the plaintiff.

In *Harman*, the City of Chicago imposed a license fee "for the keeping, use or letting to hire of any steam tug, or barge or tow-boat, for towing vessels or craft into the Chicago River, its branches or slips connected therewith." (147 U.S. at p. 409.) The city tried to justify the charge as compensation for its periodic dredging of the Chicago River, but the Court readily distinguished *Huse v. Glover* (1886) 119 U.S. 543, a case which had validated a toll for use of an improved waterway:

> "Nothing of this kind is mentioned for consideration in the ordinance of Chicago. The license fee is a tax for the use of navigable waters, not a charge by way of compensation for any specific improvement." (*Id.*, at p. 411.)

In our case, the Commission is charging rent for specific parcels of land as a landowner. There is no parallel.

For similar reasons, the citation at pages 23 and 24 of appellees' brief to certain dicta in *Packet Co. v. Keokuk* is inapposite. There, the

dicta in *Keokuk* pertain to charges for the provision of specific property or services. This Court has held that where there is an exclusive private appropriation of public property, a special charge to the benefitted party is entirely proper, regardless of the nature of the commerce in which the party is engaged. (*St. Louis v. Western Union Telegraph Co.* (1893) 148 U.S. 92, 98-99.)[3]

Similarly unhelpful are cases such as *Eureka Pipe Line Co. v. Hallanan* (1921) 257 U.S. 265, and *Michigan-Wisconsin Pipe Line Co. v. Calvert* (1954) 347 U.S. 157. Each case invalidated an admitted tax, and the incidence of the tax, not its type or measure, was the sole focus of the

---

unimproved submerged land to which the Court was referring was not appropriated to the exclusive use of a particular private company. The Commission does not suggest that it may charge "rent"—regardless of what form that rent may take, fixed or volumetric—for mere transient non-exclusive anchorage rights. The Commission's leases, in contrast, provide for exclusive rights in particular lessees to construct wharves on state property and to berth next to them.

[3] In rejecting the assertion that a per-pole charge for use of city streets by a telegraph company was a tax rather than a rental charge, the Court discussed the difference between transient, non-exclusive use of public property and exclusive use (which justified a rental charge):

> "The use which the defendant makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveller, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveller. This use is common to all members of the public. . . . But the use made by the telegraph company is . . . permanent and exclusive. It as effectively and permanently dispossesses the general public as if it had destroyed that amount of ground." (*St. Louis v. Western Union Telegraph Co.* (1893) 148 U.S. 92, 98-99.)

It is for such an exclusive right of private appropriation, and only for such a right, that the Commission charges a rental, volumetric or otherwise.

Court's inquiry under the Commerce Clause. The question was whether the incidence of the tax was sufficiently "local" to escape invalidation under the Commerce Clause. Neither case stands for the proposition that the States are prohibited from charging rent for their property—volumetric or otherwise—when they allow it to be appropriated to the private use of persons engaged in interstate commerce.

II. THERE IS NO DISCRIMINATION AGAINST INTERSTATE OR FOREIGN COMMERCE

Appellees do not dispute that the challenged regulation applies to all types of state property, all types of lessees, all types of commodities, and all types of commerce; nor do they dispute that volumetric rents have been negotiated with persons other than the plaintiff companies regarding commodities other than petroleum and petroleum products. Based on a hodge-podge of statements and assumptions for which they offer no supporting authority, and which have no basis in the record, they nonetheless conclude that the regulation is inherently discriminatory.

The nub of appellees' thesis here is that commodities in intrastate commerce do not move by vessel, and that only interstate and foreign commerce is waterborne. The statistics on waterborne commerce compiled by the Corps of Engineers demonstrate otherwise. The tonnage figures of the Corps for California ports yield the following percentages, by type of commerce: "internal" and "local" commerce (commerce confined to the same inland body of water or port area, respectively), 13.9 percent; "coastwise" commerce (oceangoing commerce, both interstate and intrastate), 42.2 percent; foreign commerce, 42.4 percent.[4]

---

[4] See U.S. Army Corps of Engineers, Waterborne Commerce of the United States, Calendar Year 1982, Part 5, National Summaries, p. 18. The total of the percentages is slightly less than 100 percent because

With particular regard to petroleum and petroleum products, the Corps figures do show considerable quantities of incoming crude oil, but they also show millions of tons of refined products being shipped out, much of it in "internal" commerce.[5] Among the refined products issuing from the refineries, some of the highest volumes are in residual fuel oil, which is the fuel used by numerous power plants along the California coast.[6] The utility companies receive these intrastate shipments of fuel oil over wharves located on lands leased from the State.[7]

The foregoing statistics demonstrate that foreign and interstate commerce are in no way the subject of inherently discriminatory treatment in the application of the challenged volumetric rental regulation.

III. THE STATE HAS NO MONOPOLY ON LAND SUITABLE FOR PORT FACILITIES

Appellees have manipulated some acreage figures in an effort to picture the State as having a monopolistic stranglehold on port sites along the California coast. Appellees' purpose is to contrive support for the "tariff" argument discussed previously and also to displace application of the "market participant" exception to application of the Commerce Clause.

Appellees have taken the vast ocean-covered acreage owned by the State, extending all the way out to the three-

---

several of the smaller ports did not report their tonnage by type of traffic.

[5] See *id.*, Part 4, Waterways and Harbors, Pacific Coast, Alaska and Hawaii, pp. 5, 6, 22, 23-24, 25, 26.

[6] See *ibid.*; Donley, Atlas of California (1979) pp. 88, 102.

[7] See, e.g., regarding the San Diego Gas & Electric Company lease at Encina (see map attached as appendix to appellants' opening brief), Donley, Atlas of California (1979) pp. 88, 102, and Part 4 of Corps report on waterborne commerce, footnote 5, *supra*, p. 9.

mile limit, and then compared the total of that acreage to the aggregate near-shore acreage owned by private parties and by some 60 local governmental agencies. Predictably, they derive a large figure for the percentage of tide and submerged land that is state-owned.

The problem with such gross acreage comparisons is that they bear no relation to the much more limited geographic scope of the market in which the Commission is participating. The market under discussion is the market for sites where cargo can be loaded and offloaded. Both for physical and economic reasons, such sites are located in near-shore areas, and usually in the vicinity of population centers. With specific regard to sites for offloading and onloading petroleum and petroleum products, the vast majority of California's refining capacity is located in the San Francisco and Los Angeles metropolitan areas. (See Donley, Atlas of California (1979) p. 87.) That is also where the bulk of the existing port facilities are located. (See *id.*, pp. 102-103.) In San Francisco Bay and the Delta, for instance, there are some 71 commercial/industrial port facilities. (See *id.*, p. 103.) And as it happens, it is in and near Los Angeles and around San Francisco Bay where most of the tide and submerged land holdings of private parties and of local governmental entities are clustered. (See Br. for the Appellants, pp. 6, 20, appendix and map.)

Appellees' calculations thus bear no relation to market reality. At best, they are useless; at worst, misleading.

Appellees ultimately acknowledge that local governments holding grants of tide and submerged lands also participate in the market for port facilities, but then argue that they are nothing more than agencies of the State, and that it is still "the State" that lessees are dealing with when they obtain leases from local ports. This is nonsense. The State has absolutely no control over the rates set or negotiated by local ports. In fact, the competition for trade among

California ports (all of which are "state agencies" according to appellees) is quite fierce. The local government tidelands grantees are no more economically deferential to the State than they are to each other, as is clear from the recurrent litigation over the state-local allocation of royalties from oil produced on the granted land. (See, e.g., *City of Long Beach v. Marshall* (1938) 11 Cal.2d 609; *Mallon v. City of Long Beach* (1955) 44 Cal.2d 199.) It would come as a big surprise to both the cities and the State that "what goes into the pocket of one benefits the other." (Appellees' Br., p. 27.) From neither a legal nor an economic perspective is there any merger of the cities and the State.[8]

Appellees' attempt to downplay privately-held tide and submerged lands as an alternative location for port facilities is also flawed. The uncertainties that may have existed for a private tidelands owner in 1972 concerning the ability to proceed safely with development on tide and submerged lands (see Appellees' Br., pp. 26, 30-31) have been largely dissipated by the subsequent passage of the California

---

[8] Cities are created by special charter ("charter cities") or are incorporated under general authorizing legislation ("general law cities"), are accorded autonomy over their local affairs by the California Constitution (art. XI, §§ 5, 7), and can act in other areas to the extent not preempted by state legislation. For funding, the cities look predominantly to local sources of revenue, such as the property tax. It is true that in the years immediately following the 1978 passage of the constitutional amendment restricting real property assessments and tax rates ("Proposition 13", article XIII A of the California Constitution), the cities looked temporarily (and not always successfully) to the State for "bail-out" funds. But the cities are being weaned from this increased economic dependence, and are looking for innovative means of raising needed funds from purely local sources, such as the sale and leaseback of public facilities, additional proprietary activities, and new local taxes and benefit assessments. (See Kroll, California Cities vs. Prop. 13, 3 Calif. Lawyer (No. 6, June 1983) pp. 28, 30.)

Coastal Act of 1976[9] and the confirmation by the Legislature, in 1974, that such owners are entitled to compensation for "lawful improvements . . . made in good faith" if ever the State should wish to devote the land to other uses.[10]

Finally, regarding appellees' strained argument that the Commission has a "monopoly" in the context of lease renewal, we note appellees' admission that plaintiffs' refineries have been in existence for some 60 years. (See Appellees' Br., p. 30.) This is ample time to write off the initial and any subsequent capital investment, even assuming that the initial lease term that was obtained was insufficient in length to amortize the cost of the adjacent refinery.[11]

---

[9] Cal. Pub. Resources Code, § 30000, et seq. Under the Coastal Act, private landowners can now apply to the California Coastal Commission for permission to make improvements on privately-owned tide and submerged land. The development policies of the act specifically contemplate issuance of permits for "coastal-dependent industrial facilities", new or expanded port facilities, and new ~~tanker facilities~~. (Cal. Pub. Resources Code, §§ 30233(a), 30260, 30261.) The 1976 act's predecessor, the California Coastal Zone Conservation Act of 1972, was adopted by initiative act approved November 7, 1972, which was after the date of the article cited by appellees.

[10] Cal. Pub. Resources Code, § 6312, Cal. Stats. 1974, ch. 1191, § 1.

[11] It was only in the context of lease renewals adjacent to existing refineries that the Ninth Circuit concluded that the companies "must use" tidelands administered by the Commission. (J.S. App. A-2.) For the reasons set forth in our opening brief at page 22, footnote 16 and accompanying text, this characterization erroneously assumes that the company has a reasonable expectancy of a lease in perpetuity. This Court certainly owes no deference to such an erroneous characterization, given the circumstance that this case is here following entry of summary judgment, not after an evidentiary trial on the merits regarding disputed facts. Cases such as *Branti v. Finkel* (1980) 445 U.S. 507, 508, 511, 512, fn. 6, 513, and *Pick Mfg. Co. v. General Motors Corp.* (1936) 229 U.S. 3, 4, are therefore inapposite. In any case, the lower courts here did *not* state, contrary to the impression created by

IV. THE CHALLENGED RENTAL MODE IS A REASONABLE ONE AND IS IN WIDE USE BY OTHERS; TO PROHIBIT ITS USE BY THE COMMISSION WOULD FORCE THE STATE TO SUBSIDIZE INTERSTATE AND FOREIGN COMMERCE

Concerning the reasonableness of the challenged rental mode, the existence or nonexistence of a state monopoly over tide and submerged lands is irrelevant. In a monopoly situation, if there were unilateral imposition of exorbitant *amounts* of rent, that might present a question for resolution by Congress, or possibly the courts.[12] But such a question could be presented even if the mode of rent used were the one favored by appellees — a flat annual amount that is a stated percentage of the appraised fee value of the land. What if the amount of such a flat rent were set at 90 percent, or even 120 percent, of appraised fee value? Would plaintiffs or other prospective lessees meekly concede that because the "mode" of rent was legitimate, they had no recourse? Of course not. Their argument would be that the *dollar amount* of the rent was excessive.

This helps focus the issue presented here; and the issue is not the reasonableness of particular amounts, but the

---

appellees, that the Commission has a monopoly on all lands suitable for wharves, or that, "because of the location, the State's lands are indispensable to the use of the facilities for [interstate and foreign] commerce." (Appellees' Br., p. 5.)

[12] If there were a monopoly, and prospective lessees needing the lands for port facilities thought that the amounts of rental being asked were too high, they might seek relief in court on the theory that the "negative implications" of the Commerce Clause entitled them to rentals that were "reasonable" in amount. Whether the courts would engage in such ad hoc determinations of reasonableness is unclear. The Court has expressed reluctance in the field of taxation of interstate commerce, for instance, to enter a similar thicket, deferring instead to Congress. (See *Commonwealth Edison Co. v. Montana* (1981) 453 U.S. 609, 627-628.)

reasonableness of the volumetric rental mode in general. Appellees say that it is *per se* prohibited, regardless of rental amount. They request invalidation of the regulation that merely *authorizes* this *form* of rent.

This is not to say that actual rental amounts under particular Commission leases will not bear scrutiny. If and when there is a challenge to the reasonableness of specific rental amounts, the Commission is willing to defend such amounts in court or in any other appropriate forum.[13] We have noted appellees' efforts to color the perception of the more general issue presented here by putting forward alleged rates of return on volumetric leases already negotiated. Given the sweeping ban of *any* volumetric rent sought by appellees, particular rental amounts are of course irrelevant. Apart from their lack of relevancy, however, the record demonstrates that these figures are inflated; they are a product of bad arithmetic, selective manipulation of numbers, and unwarranted assumptions.[14]

---

[13] The Commission is prepared as well to defend its leasing practices against attacks on any other ground—particularly against assertions that are false. One such falsehood is the statement by the oil companies at page 9 of their brief that the Commission demanded a volumetric rental as a condition of approving an assignment of a lease to Pacific Refining Company. The truth is that, at the time of the requested assignment, a firm rental still had not been negotiated with Pacific's predecessor; although a firm rental was negotiated contemporaneously with the assignment, approval of the assignment was not conditioned upon change of a rental already in place. (J.A. 113.)

[14] The principal flaw in appellees' numbers is their choice of the fee value figure to be used in calculating a rate of return. Uniformly, they have used the reduced value figure produced by negotiations with Commission staff, rather than the fee value determined by the staff's appraisers. This, of course, produces a higher rate of return. (Compare Commission appraised values and lower negotiated values (J.A. 114) with calculations and rental amounts contained in the various declarations of appellees (J.A. 21, 54, 61, 75). A review of appellees' calculations using the lower figures also reveals some bad arithmetic; and the

Another set of statements by appellees that are also both beside the point and inaccurate are those concerning the comparable land values used by the Commission's appraisers and their alleged use of these values regarding submerged lands in "200 feet" of water. It suffices here to say that Commission appraisers have used the values attributed by the ports to their wetlands, not the values of "industrial building site[s] in the adjacent community" (see J.A. 25-34); that most state sites involve lands immediately adjacent to shore (all five lease sites mentioned in appellees' declarations fit this description); and that, if a particular state site is indeed located at greater depths than are mooring sites in a port, that may actually be an advantage, given the saved cost of the continual dredging that is necessary to allow passage by today's deep-draft vessels in the comparatively shallow waters of enclosed ports (see J.A. 124-125).

Turning to the reasonableness of the volumetric rental mode *per se*, appellees do not really challenge the extensive evidence contained in the Administrative Record concerning the use of the volumetric rental mode for both improved and unimproved property. They do state that the testimony at the hearings was that "the effect of such a system of charges would be to discourage commerce" (Appellees' Br., p. 6), but the cited pages of the Administrative Record contain only general objections that the lessee's cost of doing business would be increased in an

errors are all on the high side. Correction of these two factors yields substantial reductions in the calculated rates of return. For instance, appellees' *highest* calculated rates of return, 28 to 29 percent on the Pacific Refining lease (Appellees' Br., pp. 9-10) shrink under scrutiny to 17 to 19 percent. And the calculated returns should be reduced even further, when it is considered that appellees' projections for returns in future years assumed absolutely no increase in land value over a ten-year period; i.e., a land value negotiated in 1976 was assumed to be unchanged for purposes of figuring a rate of return in 1980 or 1985.

indeterminate amount (e.g., J.A. 163, 164, 180, 227, 234), or a lessee's calculations of increased rents, which calculations were based on the fixed rate schedule for various commodities that was part of the initial staff proposal, but later abandoned (see J.A. 116-117, 120).

Concerning practices of the ports, appellees again maintain that ports may use volumetric charges because of the additional services they provide. They ignore the extensive use of such charges for unimproved property by the ports and others. Further, the additional port services and facilities that they use as examples (dredging, navigational aids, and breakwaters) are independently charged for in the form of a separate non-volumetric fee called "dockage" that is applied by the ports solely against the vessel. (J.A. 428, 434, 446, line 23.) The volumetric wharfage charged by the ports, on the other hand, is one of a number of charges (also including wharf demurrage and storage) that are applied against a rate base that includes as a component raw land valued at its current fair market value. (J.A. 401, 402-404, 411-413, 415, 417, 423-433, 445-449.) We grant that the ports often (but not always) provide improved property, but it cannot be gainsaid that a portion of the wharfage charge even in such situations represents a volumetric rent on raw land.

At bottom, appellees' assertion here seems to be that there is only one way to obtain a fair return on leased property and that is by a flat annual rent. The practice of the ports and many other lessors establishes that the practice in the rental market is otherwise.

Neither is there anything in the source or nature of the State's title to tide and submerged lands that obligates it to subsidize its lessees by foregoing a rental mode that in some cases might yield a higher rent than would a fixed rent tied to appraised fee value. It is true that such lands are held in trust, but appellees' statement that the State's title "is not a

proprietary title" (Appellees' Br., p. 21) is simply wrong. This argument that the State is obligated to use its trust lands to subsidize those engaged in "commerce" was made by appellees before the California court of appeal and was flatly rejected as inconsistent with established law concerning the nature of the State's ownership of such lands.[15]

Finally, appellees refer to a general report on rates of return submitted to the Commission in early 1975. With certain exceptions regarding large marina sites (for which the report recommended percentage and gallonage rentals), the report recommended that a fixed return of 8 percent be sought for the Commission's leases. (J.A. 339.) Appellees focus on a sentence in the report which states that rentals based on a percentage of gross receipts are not used for

---

[15] The court described the coexistence of a proprietary title and the State's trust responsibilities in such lands as follows:

> "[T]he State's ownership in trust lands has a dual nature: the governmental obligation to protect trust uses of such lands by the public (the '*jus publicum*'), and the proprietary right, as an incident of ownership, to obtain compensation for the sale or lease of such land to private parties (the '*jus privatum*'). *Oakland v. Oakland Water Front Co.* (1897) 118 Cal. 160, 183; *People v. California Fish Co.* (1913) 166 Cal. 576, 593-594, 596, 599; *Marks v. Whitney* (1971) 6 Cal.3d 251, 260; *Boston Waterfront Dev. Corp. v. Comm.* (Mass. 1979) 393 N.E.2d 356, 359; *Brusco Towboat Co. v. State* (Ore. App. 1977) 567 P.2d 1037, 1044-1045, affd. in part (Ore. 1978) 589 P.2d 712, 718.) The *jus privatum* is the normal right to sell or lease something which is owned; the *jus publicum*, however, which cannot be sold or leased, restricts that normally broad right. When the State leases trust lands, it is exercising a proprietary function, with the caveat that it cannot unreasonably impair the public's trust rights (the *jus publicum*). (See *ibid.*; *Athletic Club v. Board of Harbor Commrs.* (1933) 130 Cal.App. 376, 386-387; *Spalding v. United States* (S.D. Cal. 1937) 17 F.Supp. 957, 962, affd. (9th Cir. 1938) 97 F.2d 697.)" (*Western Oil & Gas Assn. v. State Lands Com.* (1980) 105 Cal.App.3d 554, 566 [164 Cal.Rptr. 468], hg. denied by Cal. Supreme Ct. July 2, 1980.)

industrial leases. (J.A. 324.) Accepting the accuracy of that statement, it certainly does not address industrial leases based on volume; and the studies conducted by the Commission's staff over the subsequent year and a half developed the numerous examples of volumetric rentals for the use of unimproved land for industrial purposes that are discussed in appellants' opening brief.

Appellees' point here again is that ground leases must be limited to a fixed rate of return in order to be "reasonable", and that variable rent ground leases are inherently unreasonable—a proposition that is at odds with actual practice in the rental market for ground leases. The fact that variable rent leases will often yield returns greater than fixed-rent leases is simply a truism, not an indictment of the rental mode. If variable rent leases did not on occasion produce higher returns, there would be no reason for employing such an alternative mode of rent in the first place.

The challenged rental mode is a reasonable one, and should be upheld. The opposite course—invalidating the Commission's regulation and entirely foreclosing the use of this form of rent, regardless of particular rental amounts—would force the State in many cases to subsidize the commercial enterprises of its lessees. Nothing in the Constitution requires this anomalous result.

CONCLUSION

For the reasons discussed in this and appellants' earlier brief, the decision of the Court of Appeals for the Ninth Circuit should be reversed, and the case remanded to the district court for entry of an order denying the motion of the plaintiff companies for summary judgment and granting that of the State Lands Commission.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the
State of California
N. GREGORY TAYLOR
Assistant Attorney General
DENNIS M. EAGAN
Deputy Attorney General
(Counsel of Record)
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3650

Counsel for Appellants

February 14, 1985